UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Crim. No. 93-29-B**
	)	
BIENVENIDO FORNET,	)	
	)	
Defendant	)	

RECOMMENDED DECISION TO DENY DEFENDANT'S MOTION FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255 (1994 & Supp. 1997)

Bienvenido Fornet moves this Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1994 & Supp. 1997). Fornet pleaded guilty to one count of possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841 (1981 & Pamph. 1997), and one count of conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846. He initially was sentenced to a concurrent term of 108 months' imprisonment, but subsequently received departures, upon motions by the government, ultimately reducing the sentence to 96 months' imprisonment. Fornet claims (1) that he was entitled to receive a two-point downward departure at sentencing based on his willingness to be voluntarily deported from the country; (2) that he received ineffective assistance of counsel at sentencing because his lawyer was unfamiliar with the possibility of a departure based on voluntary deportation; and (3) that the Court erred by not considering the possibility of such a departure.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (citation

and internal quotations omitted). Because it finds that Fornet's allegations are insufficient to justify relief even if accepted as true, the Court concludes that a hearing is unnecessary and recommends that his motion be dismissed.

I. Background

On June 10, 1993, agents of the Maine Drug Enforcement Agency (MDEA) executed a search warrant at the home of an individual in Bradford, Maine, where they seized ten ounces of cocaine. Having decided to cooperate with the MDEA, the individual who lived at the house identified the supplier of the drugs as the petitioner in the case at bar, Bienvenido "Benny" Fornet, of Lawrence, Massachusetts. From the period between December 1991, through June 1993, Fornet provided the cooperating individual and others in the probe with 16.32 kilograms of cocaine.

A grand jury indicted Fornet on July 14, 1993, on one count of conspiracy to possess cocaine with the intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1), 846, and one count of possession of cocaine with the intent to distribute it in violation of 21 U.S.C. § 841. On August 26, 1993, Fornet pleaded guilty in federal court to both of the counts. After considering his acceptance of responsibility, his prior criminal history, the fact that he had been on probation at the time of his arrest for the current offense, and the government's suggestion for a departure, the Court sentenced Fornet to a concurrent term of 108 months' imprisonment. Following entry of the judgment on the docket on February 7, 1994, Fornet did not appeal his sentence. The government subsequently moved for departures of the sentence on two other occasions. The Court granted the motions, which ultimately reduced Fornet's sentence to a term of ninety-six months. Fornet filed the current motion on April 21, 1997.

II. Discussion

A. Whether Fornet was entitled to receive a downward departure at sentencing for his willingness to be voluntarily deported from the country

Fornet initially contends that he was entitled to receive a two-point departure at the sentencing stage because he was willing to be voluntarily deported from the country. In particular, Fornet contends that his willingness to be deported allows for a departure under the sentencing guidelines as "conduct not contemplated by the Guidelines," U.S.S.G. § 5K2.0, and that such a theory of departure was recommended to United States Attorneys in a recent memorandum by the United States Attorney General. The government contends that any complaint by Fornet regarding the application of the sentencing guidelines is not cognizable pursuant to a section 2255 motion.

It is well settled that "[a] nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances." *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Such a claim includes a challenge based on application of the sentencing guidelines. *Id.* In view of the fact that Fornet did not appeal his sentence, and because he cites no exceptional circumstance excusing such a failure, he is barred from challenging the calculation of his sentence through this motion.

B. Whether Fornet received ineffective assistance of counsel at sentencing because his lawyer was unfamiliar with the possibility of a departure based on voluntary deportation

In conjunction with the above claim, Fornet contends that he received ineffective assistance of counsel at the sentencing stage because his attorney was not familiar with or did not advocate for the possibility of a departure based on deportation. The government contends that Fornet is not entitled to relief on this claim because he fails to demonstrate any deficiency or prejudice that resulted from his attorney's performance.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that his counsel's performance was deficient. *Id.* at 687. The petitioner also must show that, but for his counsel's deficient performance, the outcome of the trial would have been different. *Id.* A failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.*

Despite his contentions to the contrary, Fornet has demonstrated neither deficiency of performance nor prejudice resulting therefrom on the part of his attorney. His contention that his attorney should have advocated for a departure based on Fornet's deportable status is unavailing. It is difficult to conceive how his attorney should have known of such a novel argument considering that the memorandum from the Department of Justice on which Fornet bases this claim was not authored until April 28, 1995, well after his sentencing. Fornet has set forth insufficient evidence to show that his attorney should have known of or made such an argument. His lawyer's performance thus almost certainly was not deficient. *Strickland*, 466 U.S. at 694. Nor has Fornet demonstrated how he was prejudiced by the failure of his attorney to argue such a claim. Because Fornet has not showed that he would not have pleaded guilty absent his attorney's error, his claim must fail under the second prong of the *Strickland* test, as well. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

C. Whether the Court erred by not considering the possibility of a departure based on Fornet's willingness to be deported

Finally, Fornet contends that the Court was in error when it imposed his sentence because it likely was unaware of its own power to grant a departure based on his deportability, and also was unaware that criminal aliens like himself would be subject to a harsher sentence because, as aliens,

they are unable to participate in a residential drug abuse program and, thus, are not eligible for early release based on the completion of such a program. The government contends that this argument must fail because a section 2255 motion must only address the imposition of a sentence, not its execution.

The Court concludes that it is without jurisdiction to entertain this claim in view of the fact that section 2255 "'does not grant jurisdiction over a post-conviction claim attacking the execution, rather than the imposition or illegality of the sentence.'" *Dishmey v. United States*, 929 F. Supp. 551, 552 (D.P.R. 1996) (quoting *United States v. Di Russo*, 535 F.2d 673, 674 (1st Cir. 1976)). Because the Court did not sentence Fornet to any drug abuse program, and in view of the fact that he may not now through this motion challenge the manner in which his sentence is carried out, the Court recommends that this claim be denied.

III. Conclusion

For the foregoing reasons, the Court recommends that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated this 10th day of June, 1997.